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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of The Estate of Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER ON THE MERITS

Introductory Statement

This brief is submitted by Petitioner in reply to the two respondents' briefs[1] filed in this case and in Number 72-1318. While those briefs are lengthy, Petitioner's reply is limited to a very few of the points discussed in the respondents' briefs.

[1] A red brief was filed on behalf of Respondents Del Corso, Canterbury, Jones, Martin, Srp and White. It will be referred to as the Del Corso brief. A blue brief was filed on behalf of Respondent Rhodes. It will be referred to as the Rhodes brief.

Scope of Argument

Petitioner, in her main brief, argued that, in 1871, when the Civil Rights Act was enacted, there was no historical support for an absolute immunity of executive officers to suit in tort.[2] In opposition, the Del Corso brief argues that there was in fact common law executive immunity, pointing to several cases which are claimed to support such a rule.[3]

A portion of this brief will address itself to that issue, summarizing what little legislative history may bear on the point, examining some of the early precedents and surveying the contemporary texts.

In addition, respondents have argued that permitting suit against government officials for deprivation of constitutionally secured rights places the private interest of the injured in opposition to the public interest.[4] Thus, the Rhodes brief states, " . . . in an age that has left behind animal sacrifices to the gods, symbolic expiation can be accomplished only at the cost of counter injury to persons or to institutions." [5]

In reply to this line of argument, this brief will consider directly some of the policy implications of the legal principles involved in this case.

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[2] Brief of Petitioner, p. 29 et seq.

[3] Del Corso brief, pp. 29-31.

[4] See, e.g., Del Corso brief, p. 51.

[5] Rhodes brief, p. 37.

ARGUMENTS

I. Historical Precedents

A. *Legislative History*

Unfortunately, there is little direct reference in the record of debates in the House of Representatives and Senate in March and April of 1871 to the issue of executive immunity or, for that matter, to immunities in general. The debates centered on less technical matters, such as whether the state of Ku Klux Klan bloodshed in the South was in fact as serious as represented, whether the provisions for sending in federal militia in the event of local breakdown, and for punishing private, conspiratorial interference with rights were constitutional and whether the new law ought to be applied in the north.

The sponsors of the bill argued for a broad grant of jurisdiction to permit the federal government to enforce the liberties of citizens in language which would hardly admit of immunities for wrongdoing State officials. See, e.g., Remarks of Representative Hoar, Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 333 (1871). The only specific mentions of the immunity issues are found in the remarks of opponents of the bill, who assumed that the introductory words, "Every person" admitted of no immunities and, on that basis, argued against its enactment. For example, Representative Arthur of Kentucky, a lawyer, made the following statement in the House:

> "But if the legislature enacts a law, if the governor enforces it, if the judge upon the bench renders judgment, . . . for a mere error of judgment, they are liable, and most certain, at the suit of any knave, plain or

> colored, under the pretext of deprivation of his rights, privileges and immunities as a citizen, par excellence, of the United States . . . Hitherto, in all the history of this country, and of England, no judge or court has been held liable . . . " Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 365 (1871).[6]

While the legislative history of the 1871 act, however, provides little direct evidence of the intention of its sponsors on immunities other than the text and its stated purposes, other legislation may give more guidance.

The debates leading to passage of the Civil Rights Act of April 9, 1866, 14 Stat. 27 (now 42 U.S.C. §§1981 and 1982), contain more extensive references to immunities. From those debates it can be understood that a strong majority of the 39th Congress did not see executive immunity as a serious impediment to the proposed Civil Rights legislation, but that it did consider judicial and legislative immunities seriously and specifically rejected such immunities. The 1866 Act was vetoed by President Johnson on March 27, 1866. His stated objection to the bill was that it would remove the immunity of judges and legislators from criminal liability. Cong. Globe, 39th Cong., 1st Sess. 1679 (1866). In the debates leading to the successful vote to override

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[6] See also Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 385 (1871) (remarks of Representative Lewis). The few mentions of immunity in the debates seem to lump judicial and other immunities and assume all are rejected in the act. It has, of course, been pointed out elsewhere that the legislative history does not support judicial immunity. See, e.g., *Picking* v. *Pennsylvania R. Co.*, 151 F.2d 240 (3rd Cir. 1945). See also *Littleton* v. *Berbling*, 468 F.2d 389, 405 (7th Cir. 1972). Judicial immunity, however, is at least supported by the contemporaneity of the leading decision of the Court in *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871). See *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Bauers* v. *Heisel*, 361 F.2d 581 (3rd Cir. 1966), cert. denied 386 U.S. 1021 (1967).

the veto, Senator Trumbull of Illinois, the bill's principal sponsor, took the issue head on and asserted that, as the bill was written, judges or ministerial officers of court would be punished for active misconduct, but not for innocent mistakes. Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).[7]

In 1870, after adoption of the Fourteenth Amendment, the 41st Congress reenacted the criminal portion of the 1866 Act (presently 18 U.S.C. §242), basing its power on Section Five of the Fourteenth Amendment as well as on the Thirteenth Amendment. It also added what is presently 18 U.S.C. §241, reaching private conspiracies to interfere with civil rights. The debates expose clearly the intention to reach and punish officials' misconduct. The remarks of Senator Pool of North Carolina express this view:

> "The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, to subject, or cause to be subjected, any citizen to the deprivation of any of the rights secured and protected by the Act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. . . . There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law." Cong. Globe, 41st Cong., 2nd Sess. 3611 (1870).

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[7] In his remarks directed to legislative immunity, Senator Trumbull argued that a legislator enacting an unconstitutional law does not affect a deprivation of a constitutional right. Rather, the executive officer who executes it does, and it is he who would be liable. See Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

It is conceded, of course, that the interpretation of one of the Civil Rights Acts is not controlling in interpreting a different act. See *District of Columbia* v. *Carter*, 409 U.S. 418 (1973). Nevertheless, it is fair to assume that the members of the 42nd Congress who deliberated on the 1871 Act must have been aware of the earlier debates and that, having failed to take some positive steps to disassociate the 1871 Act from the earlier Acts' rejection of executive, and other immunities, its sponsors must not have intended to deviate from the earlier Congress' views.

Finally the methodology of the 1871 Act is inconsistent with immunity. The perceived problem was private, vigilante groups injuring white and black alike in the South. The methodology was to reach, with injunctions and damages, the private conduct through Section 2 (now 42 U.S.C. §1985(3)) and the conduct of public officers, such as sheriffs, who failed to prevent or remedy injury, through Section 1 (now 42 U.S.C. §1983).[8] It is hard to conceive how either sponsors or opponents of this legislation could have seen its object being served by permitting an immunity for the people who enforce State law.

B. *The Common Law*

The Anglo-American tradition has been to accord a total immunity to the sovereign and none to its officers. Harold Laski summarized the English position as follows:

> "The protection taken to the Crown has not, in general, been extended to public officers. 'With us,' says

[8] A theory supporting Section 1 was that an official who did not act denied equal protection of the laws. See, e.g., Cong. Globe, 42nd Cong., 1st Sess., Pt. 1, p. 334 (Rep. Hoar), p. 506 (Sen. Pratt) (1871).

> Professor Dicey, 'every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.' No one can doubt the value of this rule, for it constitutes the fundamental safeguard against the evils of bureaucracy. Nor have its results been of little value. A colonial governor and a secretary of state have been taught its salutory lesson; and it is, as a learned commentator has pointed out, that which makes for the distinction betwene the policemen of London and the policemen of Berlin. It has the merit of enforcing a far more strict adherence to law than is possible within the limits of any other system. . . . " (footnotes omitted). H. J. Laski, The Responsibility of the State in England, 32 Harv. L. Rev. 447, 457-58 (1919).

One outstanding example of the English rule is the decision of Lord Mansfield for the King's Bench in *Mostyn* v. *Fabrigas,* 1 Cowp. 161, 98 Eng. Rep. 1021 (1774). The plaintiff, a subject of Minorca, a Crown colony, brought suit in the King's Court charging the colonial governor of Minorca with false imprisonment. The governor defended on the ground, *inter alia,* that "the defendant being governor of Minorca, is answerable for no injury whatsoever done by him in that capacity." 1 Cowp. 171, 98 Eng. Rep. 1027. The Court rejected the plea, with Lord Mansfield stating that ". . . to lay down in an English Court of Justice such a monstrous proposition, as that a governor, acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property,

with impunity, is a doctrine that cannot be maintained." 1 Cowp. 175, 98 Eng. Rep. 1029. To the same effect is *Huckle* v. *Money*, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763), an action against agents of the Secretary of State, Lord Halifax, in which damages were awarded for assault, trespass and false imprisonment based upon an unlawful warrant to seize the printers of allegedly seditious literature.[9] See also *Entick* v. *Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765).

Analysis of the American cases is more complex, partly because of the multiplicity of jurisdictions and partly because it is true that, *in this century*, the prevailing view in most states is to grant immunity to discretionary acts of executive officers.[10] Certainly, many of the American cases of the nineteenth century clearly follow the English rule. Compare *Miller* v. *Horton*, 152 Mass. 540, 26 N.E. 100 (1891) with *Warne* v. *Varley*, 6 Term Rep. 443, 101 Eng. Rep. 639 (1795). An early American case structurally very similar to *Huckle* and *Entick*, *supra*, is the decision in *Little* v. *Barreme*, 6 U.S. (2 Cranch) 168 (1804), in which a unanimous Court held that a naval officer could not avoid

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[9] Prosser refers to *Huckle* v. *Money* and the other actions resulting from the English newspaper raids of that period "as a major blow struck for the freedom of the individual against the abuse of governmental power; and so long as cheap and conniving politicians continue to abuse that power, they should not be forgotten." W. Prosser, The Law of Torts 992 (4th Ed. 1971).

[10] See generally W. Prosser, The Law of Torts 987 et seq. It is also the prevailing view in this century that no such immunity is available under the Civil Rights Act. See, e.g., cases cited in Petitioner's main brief at p. 28. The dichotomy between the federal rule applicable in Civil Rights Act cases and the one applicable in state court is sensible if it is understood that a federal remedy would probably be unnecessary for constitutional deprivations if there were a viable state remedy.

liability for the unlawful seizure of a neutral vessel on the ground that the President had ordered the seizure.

There are also several American authorities in the nineteenth century which accept the immunity concept for executive officers, although some clearly reach the conclusion by confusing the issue with judicial immunity. See e.g., *Ela* v. *Smith*, 71 Mass. 121, 136 (1855).

A complicating factor in analyzing the case is that most of the cases accepting a form of executive immunity appear to adopt a qualified, rather than absolute, immunity. In this category, for example, is the decision in *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849).[11] The plaintiff, a marine who had signed onto a ship of the United States, was imprisoned and given lashes by the ship's captain when, after the passage of his term of enlistment, he refused to obey orders while at sea. In his action for false imprisonment and battery, the Court held that the defendant captain had acted lawfully in issuing orders to the plaintiff after his term of enlistment and that the punishment given was authorized by an act of Congress. 48 U.S. at 127. Justice Woodbury went on to note that, even if in error, the captain was protected by an immunity. In describing the immunity, however, he defined it as a qualified immunity, to be lost if the captain acted with malice or in excess of his jurisdiction. "In short," he wrote, "it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error." (Citation omitted.) 48 U.S. at 131. *Kendall* v. *Stokes*, 44 U.S. (3 How.) 86 (1845)[12] is to the same effect.[13] Thus, to the extent that any executive

[11] Discussed in Del Corso brief, pp. 30-31.

[12] Discussed in Del Corso brief, pp. 29-30.

[13] Chief Justice Taney, in his opinion for the Court stated, "But as the case [before the Court] admits that he acted from a

immunity was recognized in this Court prior to 1871, it was at best a qualified immunity noted in some cases, certainly not a settled practice.[14]

C. *The Text Writers*

A possibly fruitful clue to contemporary ideas on immunities can be found in the nineteenth century texts on torts. One source in existence at the time the Civil Rights Acts were considered in Congress was Francis Hilliard's, The Law of Torts or Private Wrongs (Little, Brown & Co. 1861). Hilliard's view was as follows:

> "It remains very briefly to notice the rights and liabilities of some other public officers. It is remarked in general terms, that 'if a public officer abuses his office,' either by act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer," (footnote omitted). F. Hilliard, The Law of Torts or Private Wrongs at 285 (1861).

Judge Cooley, in his Treatise on The Law of Torts (Callaghan & Co., 1880) seems to take a contrary position. In

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sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him. 44 U.S. (3 How.) at 98-99.

[14] Two other well-known nineteenth century cases resulting in upholding executive action referred to in the Del Corso brief are *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849) and *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1927). Neither, however, deals with immunities. Both cases hold that the factual determination prerequisite to adjudication of the claim against the executive is a non-justiciable, political question, the former under the "Republican Guarantee" clause and the latter as to the presidential determination that there was an "imminent invasion" justifying a call-up of militia.

discussing the liability of executive officials, Cooley states the view "that if the duty which the official authority imposes on an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages." T. M. Cooley, Treatise on The Law of Torts at 379. In explaining the distinction, Cooley includes "discretionary" functions as public duties and ministerial functions—tasks which would be subject to control by writ of mandamus—as those owed to individuals. *Ibid.*

Cooley states the most extreme anti-liability position found in the nineteenth century texts.[15] Significantly, although there is extensive case citation in Cooley's discussion of judicial and legislative officers, there are no citations in the discussion of executive officers' liability. In another portion, Cooley appears to totally reject the amenability of governors to suit, stating that a governor "could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent." Id. at 377.[16]

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[15] This view is reflected by Mechem, who further phrases the discretionary/ministerial distinction, relying completely on Cooley as his authority for the proposition. See F. R. Mechem, A Treatise on the Law of Public Offices and Officers 390-91, 395-97 (Callaghan & Co., 1890).

[16] The quoted portion of Cooley seems to be in direct conflict with the holding of *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) that actions of the executive department, when taken in

The remaining treatises strongly reject immunity. Addison, writing in England, concluded that while an executive officer would not be liable for injuries inflicted merely by executing an act of parliament, liability would follow ". . . if the statutory powers are exceeded, or are not strictly pursued, or the things authorized to be done are carelessly and negligently done . . ." C. G. Addison, A Treatise on the Law of Torts 725 (Banks & Bros., N.Y. 1870). Frederick Pollock, likewise, adheres to the common law rejection of immunity. He first notes the rule that an official act is not immunized from judicial inquiry at the behest of an English subject merely because, as against the rest of the world it might be viewed as an act of State. F. Pollock, The Law of Torts 76 (Blackstone Pub. Co., Phila., 1887). As to the substantive rule of liability, he concludes:

> "The principle which runs through both common law and legislation in the matter is that an officer is not protected from the ordinary consequence of unwarranted acts which it rested with himself to avoid, such as using needless violence to secure a prisoner; but he is protected if he has only acted in a manner in itself reasonable, and in execution of an apparently regular warrant or order, which on the face of it he was bound to obey." Id. at 78-79.

D. *Conclusion to Part I*

In the face of the language of Section One of the Act of April 20, 1871, there should be no absolute—or even qualified—immunity for executive officers unless it is clear that

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a manner contrary to law, are in fact subject to control by judicial order. That point had certainly been reiterated at least as recently as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

a majority of Congress so intended or, in the absence of intention, if the common law at time clearly afforded such an immunity. Cf. *Bauers* v. *Heisel,* 361 F.2d 581 (3rd Cir. 1966), cert. denied 386 U.S. 1021 (1967). The legislative history exposes no intention to incorporate executive immunity. In fact such an immunity would have been opposed to the objects of the Act. Moreover, the canon that statutes should not be read in derogation of common law reads against, rather than for, executive immunity. The common law rule rejected immunity, and whatever development was beginning toward a rule of immunity in tort in the United States had not come close to reaching the present position.

II. Policy Issues

A. *The Claim of Special Privilege for Executive Officers*

As the Laski article discussed earlier pointed out, immunity of government and government officials from liability for serious wrongdoing is fundamentally at odds with a democratic regime. H. J. Laski, The Responsibility of the State in England, 32 Harv. L. Rev. 447 (1919).[17] There is no sound reason why certain people should be exempt from the rules of law binding all others. The point was made most effectively by Justice Harlan in rejecting the notion that the First Amendment gave an absolute im-

[17] Justice Holmes, in discussing the Laski article, noted his basic "sympathy with the general trend of the article" although he had logical difficulty with suit against the State without consent because it could not be subject to the law which it makes. Letter of March 16, 1919, I Holmes-Laski Letters 189-90 (Howe, Ed. 1953). Cf. *Kawananakoa* v. *Polyblank,* 205 U.S. 349, 353 (1907) (Holmes, J.). Holmes' logical difficulty would not, of course, apply to government officers.

munity to publishers from defamation liability. He wrote that "[t]o exempt a publisher [from liability for negligent reporting], because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 160 (1967). See also *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 61, 65-66 (1971) (dissenting opinion of Harlan, J.). Certainly other professions in our society who have claimed, and documented, the fact that liability rules are costly and intimidate them in performing a vital function have not been given an immunity. See, e.g., Report, Medical Malpractice: The Patient Versus the Physician, Subcommittee on Executive Reorganization of the Senate Committee on Government Operations, 91st Cong., 1st Sess. passim (1969); Report of the Secretary's Commission on Medical Malpractice, Department of Health, Education and Welfare, passim (1973).

No empirical research has been found which supports the conclusion that persons who enter government service or who run for elective office, are less likely to make negligent or reckless errors in their work than members of other professions or are less likely to use their positions to inflict intentional injury. Nor has it been proved that persons who enter government service or political life are less likely to be venal or to disregard the rights of those subject to their authority. Cf. W. Prosser, Torts 992 (4th Ed. 1971).

B. *Gregoire* v. *Biddle*

Judge Hand argued, in *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949) that, while malicious or abusive official misconduct ought, in the abstract, to be punished, it was

in fact impossible to separate the *bona fide* claims from the frivolous claims without a trial, and subjecting officials to trial in all such cases would intimidate them, leading to irresolute, passive government. The position is subject to several levels of criticism, not the least of which is that there is no empirical support for the intimidation theory, especially insofar as it postulates intimidation based on mere amenability to suit rather than on liability. Amenability to Civil Rights Act suit of police officers, since *Monroe* v. *Pape,* 365 U.S. 167 (1961), or of prison guards, see, e.g., *Johnson* v. *Glick,* 481 F.2d 1028 (2nd Cir. 1973) (opinion of Friendly, Ch. J.), has not been demonstrated to retard either of those groups in the legitimate performance of their duties. And it may have had some positive effects. In arguing for a conditional, rather than absolute, immunity to *tort* liability, Harper and James respond to Judge Hand in the following manner:

> "Where the charge is one of honest mistake we exempt the officer because we deem that an *actual holding of liability* would have worse consequences than the *possibility of actual malice* (which under the circumstances we are willing to condone). But it is stretching the argument pretty far to say that the *mere inquiry into malice* would have worse consequences than the *possibility of actual malice* (which we would not, for a minute, condone)." 2 F. Harper and F. James, The Law of Torts 1645 (1956).

Finally, the assumption behind the absolute immunity claim is that, even in a successful defense, the official suffers the cost of counsel fees and, therefore, will be intimidated by that prospect. It is commonly true, however, that public

counsel appears on behalf of the official charged with wrongdoing, as can be seen from the listing of counsel in many Civil Rights Act damage suits. In the present case, for example, an Attorney General of Ohio has testified that, while private counsel are conducting the defense, the State will pay for it. See testimony of Paul Brown, atty. gen., in *Hammond* v. *Brown,* transcript pp. 73-77, No. 70-998, U.S.D.C. N.D. O., E.D. (Nov. 23, 1970). What we are left with, then, is the claim that public officials are either too busy or too important to appear in Court when sued.

C. *Loss Shifting*

In this suit, as in others, an economic loss has been suffered as well as a personal one. Assuming fault, the optimum method of dealing with the economic aspects of the loss would be to shift it to the state where it would be shared with less economic pain by all taxpayers. This loss shifting has, of course, been urged even in the absence of fault. See, e.g., *Escola* v. *Coca Cola Bottling Co.,* 24 Cal. 2nd 453 (1944) (opinion of Traynor, J.). Cf. R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim *passim* (1965). A more basic objective of the Civil Rights Act, however, was to deter official misconduct, the hope being that the officials' fear of liability would prevent them from depriving people of their constitutional rights. Cf. O. W. Holmes, Jr., The Common Law, Lecture III *passim,* p. 77 *et seq.* (1881). The optimum reconciliation of these goals would be a system of governmental liability for constitutional deprivations effected by government officials, with a right over of the government against the government official in the event that there is proof of fault,—either negligence, recklessness, malice, or wrongful intention. See 2 F. Harper &

F. James, The Law of Torts 1637 (1956). Since that result is blocked as to states like Ohio by the Eleventh Amendment and local rules of immunity, cf. *Krause* v. *Ohio,* 31 Ohio St. 2nd 132, 285 N.E. 2nd 736 (1972), the rule of no official immunity urged by petitioner would act as a deterrent but apparently would not serve the loss distribution goal. In fact, however, some loss distribution could be effectively served by insurance, because, under a system of liability, officials would have an incentive to insure, while an absolute immunity system would make insurance redundant. The invitation to insure has been followed by many courts as a basis for eliminating immunities. Compare *Darling* v. *Charleston Hospital,* 33 Ill. 2nd 326, 211 N.E. 2nd 253 (1965) and *Moliter* v. *Kaneland Community Unit District No. 302,* 18 Ill. 2nd 11, 163 N.E. 2nd 89 (1959) with *Wendt* v. *Servite Fathers,* 332 Ill. App. 618, 76 N.E. 2nd 342 (1947). Thus, there is some reason to believe that, in addition to serving deterrence goals, a system of executive officers' liability for constitutional deprivations would aid risk distribution. Moreover, the insurance risk distribution would not come at the cost of deterrence; it has been clearly demonstrated that, in a fault-based system, properly conceived insurance, based on rating commensurate with risk, has the practical effect of increasing the cost of socially undesirable behavior, while rewarding compliance with the law with lower rates. See G. Calabresi, The Decision for Accidents: An Approach to Non-Fault Allocation of Costs, 78 Harv. L. Rev. 713 (1965); G. Calabresi, Some Thoughts on Risk Distribution and The Law of Torts, 70 Yale L.J. 499 (1961).

D. *Conclusion to Part II*

Executive immunity is essentially the mark of an autocratic regime, fundamentally inconsistent with a republican form of government. The policy justifications commonly offered for executive immunity turn out, on analysis merely to be the protection of privilege for its own sake. The specific goals of the Civil Rights Act, as well as the highly analogous goals of the Law of Torts, are best served by the rule urged by petitioner of no immunity for executive officers, combined with the already established rule of personal liability for constitutional deprivations being based upon fault.

CONCLUSION

The decision below should be reversed, and the Court should remand the case for trial without any rule of immunity.

Respectfully submitted,

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Certificate of Service

STATE OF NEW YORK,
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, being duly sworn, deposes and swears that he served copies on all of the parties required to be served by filing three copies of the attached Reply Brief of Petitioner on The Merits, properly wrapped and stamped, on each of the following:

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Duly sworn to
before me this
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.....
Notary Public

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCHEUER, ADMINISTRATRIX *v.* RHODES, GOVERNOR OF OHIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-914. Argued December 4, 1973—Decided April 17, 1974*

Petitioners, the personal representatives of the estates of students who were killed on the campus of a state-controlled university, brought these damages actions under 42 U. S. C. § 1983 against the Governor, the Adjutant General of the Ohio National Guard, various other Guard officers and enlisted members, and the university president, charging that those officials, acting under color of state law, "intentionally, recklessly, willfully and wantonly" caused an unnecessary Guard deployment on the campus and ordered the Guard members to perform allegedly illegal acts resulting in the students' deaths. The District Court dismissed the complaints for lack of jurisdiction without the filing of any answer and without any evidence other than the Governor's proclamations and brief affidavits of the Adjutant General and his assistant, holding that respondents were being sued in their official capacities and that the actions were therefore in effect against the State and barred by the Eleventh Amendment. The Court of Appeals affirmed on that ground and on the alternative ground that the common-law doctrine of executive immunity was absolute and barred action against respondent state officials. *Held:*

1. The Eleventh Amendment does not in some circumstances bar an action for damages against a state official charged with depriving a person of a federal right under color of state law, and the District Court acted prematurely and hence erroneously in dismissing the complaints as it did without affording petitioners

*Together with No. 72-1318, *Krause, Administrator, et al.* v. *Rhodes, Governor of Ohio, et al.*, also on certiorari to the same court.

Syllabus

any opportunity by subsequent proof to establish their claims. Pp. 3–6.

2. The immunity of officers of the executive branch of a state government for their acts is not absolute but qualified and of varying degree, depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken. Pp. 6–17.

471 F. 2d 430, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except DOUGLAS, J., who took no part in the decision of the case.

SUPREME COURT OF THE UNITED STATES

Nos. 72–914 AND 72–1318

Sarah Scheuer, Administratrix, Etc., Petitioner,
72–914 *v.*
James Rhodes et al.

Arthur Krause, Administrator of the Estate of Allison Krause, et al Petitioners,
72–1318 *v.*
James Rhodes et al.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 17, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari [1] in these cases to resolve whether the District Court correctly dismissed civil damage actions, brought under 42 U. S. C. § 1983, on the ground that these actions were, as a matter of law, against the State of Ohio, and hence barred by the Eleventh Amendment to the Constitution and, alternatively, that the actions were against state officials who were immune from liability for the acts alleged in the complaints. These cases arise out of the same period of alleged civil disorder on the campus of Kent State University in Ohio during May 1970 which was before us, in another context, in *Gilligan* v. *Morgan*, 413 U. S. 1 (1973).

[1] 413 U. S. 919 (1973).

In these cases the personal representatives of the estates of three students who died in that episode seek damages against the Governor, the Adjutant-General and his Assistant, various named and unnamed officers and enlisted members of the Ohio National Guard and the President of Kent State University. The complaints in both cases allege a cause of action under the Civil Rights Act of 1871, 42 U. S. C. § 1983. Petitioner Scheuer also alleges a cause of action under Ohio law on the theory of pendent jurisdiction. Petitioners Krause and Miller make a similar claim, asserting jurisdiction on the basis of diversity of citizenship.[2]

The District Court dismissed the complaints for lack of jurisdiction over the subject matter on the theory that these actions, although in form against the named individuals, were, in substance and effect, against the State of Ohio and thus barred by the Eleventh Amendment. The Court of Appeals affirmed the action of the District Court, agreeing that the suit was in legal effect one against the State of Ohio and, alternatively, that the common law doctrine of executive immunity barred action against the state officials who are respondents here. 471 F. 2d 430 (1972). We are confronted with the narrow threshold question whether the District Court properly dismissed the complaint. We hold that dismissal was inappropriate at this stage of the litigation and accordingly reverse the judgment and remand for further proceedings. We intimate no view on the merits

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[2] The Krause complaint states that the plaintiff is a citizen of Pennsylvania and expressly invokes federal diversity jurisdiction under 28 U. S. C. § 1332. The Miller complaint states that the plaintiff is a citizen of New York. While the complaint does not specifically refer to jurisdiction under 28 U. S. C. § 1332, it alleges facts which clearly support diversity jurisdiction. (App. 85.) See, Fed. Rule Civ. Proc. 8 (a) (1).

of the allegations since there is no evidence before us at this stage.

I

The complaints in these cases are not identical but their thrust is essentially the same. In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken "under color of state law" and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.

The complaints were dismissed by the District Court for lack of jurisdiction without the filing of an answer to any of the complaints. The only pertinent documentation[3] before the court in addition to the complaints were two proclamations issued by the respondent Governor. The first proclamation ordered the Guard to duty to protect against violence arising from wildcat strikes in the trucking industry; the other recited an account of the conditions prevailing at Kent State University at that time. In dismissing these complaints for want of subject matter jurisdiction at that early stage, the District Court held, as we noted earlier, that the

[3] In the *Krause* case, the Adjutant General and his Assistant also filed brief affidavits. These seem basically directed to the motion for a change of venue and, in any event, make no substantial contribution to the jurisdictional or immunity questions.

defendants were being sued in their official and representative capacities and that the actions were therefore in effect against the State of Ohio. The primary question presented is whether the District Court acted prematurely and hence erroneously in dismissing the complaint on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim.

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well-established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

> "[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45 (1957) (footnote omitted).

See also *Gardner* v. *Toilet Goods Assn. Inc.,* 387 U. S. 167, 172 (1967).

II

The Eleventh Amendment to the Constitution of the United States provides: "The judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by citizens of another

State . . . ." It is well-established that the Amendment bars suits not only against the State when it is the named party but when it is the party in fact. *Edelman* v. *Jordan*, — U. S. — (1974); *Poindexter* v. *Greenhow*, 114 U. S. 270, 287 (1884); *Cunningham* v. *Macon and Brunswick R. Co.*, 109 U. S. 446 (1883). Its applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record." *Ex parte New York*, 256 U. S. 490, 500 (1921).

However, since *Ex parte Young*, 209 U. S. 123 (1907), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

> "comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U. S., at 159–160. (Emphasis supplied.)

Ex parte Young, like *Sterling* v. *Constantin*, 287 U. S. 378 (1932), involved a question of the federal court's injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, *Edelman* v. *Jordan*, — U. S. —; *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946); *Ford Motor Company* v. *Dept. of Treasury*, 323 U. S. 459 (1945); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1945), damages against individual

defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. *Myers* v. *Anderson*, 238 U. S. 368 (1915). See generally *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.

Analyzing the complaint in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim—but have not yet established by proof—was a deprivation of federal rights by these defendants under the color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaint for lack of jurisdiction.

III

The Court of Appeals relied upon the existence of an absolute "executive immunity" as an alternative ground for sustaining the dismissal of the complaint by the District Court. If the immunity of a member of the Executive Branch is absolute and comprehensive as to all acts allegedly performed with the scope of official duty, the Court of Appeals was correct; if, on the other hand, the immunity is not absolute but rather one that is qualified or limited, an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed by evidence. The concept of the immunity of government officers from personal liability

springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King could do not wrong"—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.[4] This

[4] In England legislative immunity was secured after a long struggle, by the Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 Wm. & Mary, Sess. 2, c. II. See *Stockdale* v. *Hasard*, 9 Ad. & El. 1, 113–114 (1839). The English experience, of course, guided the drafters of our "Speech or Debate" Clause. See *Tenney* v. *Brandhove*, 341 U. S. 367, 372–375 (1951); *United States* v. *Johnson*, 383 U. S. 169, 177–178, 181 (1966); *United States* v. *Brewster*, 408 U. S. 501 (1972).

In regard to judicial immunity, Holdsworth notes: "In the case of courts of record . . . it was held, certainly as early as Edward III's reign, that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction." 6 Holdsworth, The Principles of English Law 235 (1927). The modern concept owes much to the elaboration and restatement of Coke and other judges of the Sixteenth and early Seventeenth Centuries. 6 Holdsworth, 234 *et seq.* See *Floyd* v. *Barker*, 12 C. Rep. 23 (1608). The immunity of Crown has traditionally been of a more limited nature. Officers of the Crown were at first insulated from responsibility since the King could claim the act as his own. This absolute insulation was gradually eroded. Statute of Westminster I, 1275, 3 Edw. I, C. 24 (repealed); Statute of Westminster II, 1285, 13 Edw. F, 6.23 (repealed). The development of liability—especially during the times of the Tudors and Stuarts was slow; see, *e. g.*, Public Officers Protection Act, 1609, 7 Jac. I, 6.5 (repealed). With the accession of William and Mary, the liability of officers saw what Jaffe has termed "a most remarkable and significant extension" in *Ashly* v. *White*, 1 Brown P. C. 45, 1 Evd. Rev. 417 (H. C. 1703), reversing 6 Mod. 45, 87 Eng. Rep. 880 (Q. B. 1702). Jaffe, L., "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1, 14 (1963). A. V. Dicey, The Law of the Constitution, 193–194 (10th Ed. 1959)

official immunity apparently rested, in its genesis, on two mutually dependent rationales: [5] (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

In this country, the development of the law of immunity for public officials has been the product of constitutional provision as well as legislative and judicial processes. The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report or action done in session. U. S. Constitution, Art. I, § 6. See *Gravel* v. *United States*, 408 U. S. 606 (1972); *United States* v. *Brewster*, 408 U. S. 501 (1972); and *Kilbourne* v. *Thompson*, 103 U. S. 501 (1880). This provision was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment which had been secured in England in the Bill of Rights of 1689 and carried to the original colonies.[6] In *United States* v. *Johnson*, 383 U. S. 169, 182 (1966), Mr. Justice Harlan noted:

> "There is little doubt that the instigation of criminal charges against critical or disfavored legis-

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(footnotes omitted). See generally *Barr* v. *Matteo*, 360 U. S. 564. Good faith performance of a discretionary duty has remained, it seems, a defense. See Jaffe, *supra*, at 216. See also *Spalding* v. *Vilas*, *supra*, 493 *et seq.*

[5] Jaffe, L., "Suits Against Governments and Officers: Damage Actions," 77 Harv. L. Rev. 209, 223 (1963).

[6] Mr. Justice Frankfurter noted in *Tenny* v. *Brandhove*, 341 U. S. 367, 373 (1951): "The provision in *United States Constitution* was a reflection of political principles already firmly established in

> lators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause."

Immunity for the other two branches—long a creature of the common law—remained committed to the common law. See, *e. g., Spalding* v. *Vilas,* 161 U. S. 483, 498–499 (1896).

Although the development of the general concept of immunity, and the mutations which the underlying rationale has undergone in its application to various positions are not matters of immediate concern here, it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating "it is not a tort for the government to govern." *Dalehite* v. *United States,* 346 U. S. 15, 57 (1953) (dissenting opinion). Public officials, whether Governors, Mayors or police, legislators or judges who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices.[7] Implicit in the idea that

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the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege." See *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808). See also *Kilbourne* v. *Thompson,* 103 U. S. 168, 202 (1880).

[7] For example, in *Floyd* v. *Barker,* 12 Co. Rep. 23 (1608), Coke emphasized that judges "are to make an account to God and King" since a contrary rule "would tend to the scandal and subversion of all justice. And those who are the most sincere would not be free from continual calumniations . . . ." 12 Co. Rep., at 25. See also: *Yasselli* v. *Goff,* 12 F. 2d 396, 399 (CA2 1926), aff'd *per*